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No. 98-1991

In the Supreme Court of the United States

PUBLIC LANDS COUNCIL, ET AL., PETITIONERS,

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF THE INTERIOR SECRETARY, ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents do not deny the importance of the questions presented to the Nation as a whole or to the western livestock industry in particular. As shown in the petition, the decision below threatens the livelihood of tens of thousands of grazing permittees, their families and communities, and thousands more agricultural lenders. Respondents do assert (without support) that the 1995 rules will have no practical effect in such quarters. But the *amicus* briefs provide convincing proof that the 1995 regulations have been highly disruptive of long-standing means of doing business in those economic sectors; indeed, they show that lenders will no longer consider grazing permits as security for loans or advance money for range improvements. This Court repeatedly grants review in cases involving public lands—170 million acres are at issue here—even absent a conflict among the circuits. *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari"); *Andrus*, 446 U.S. at 506; *Coleman*, 390 U.S. at 601.

Respondents conspicuously fail to address the central question presented by the Petition: how the regulations can be squared with the Act's command that "grazing privileges recognized and acknowledged shall be adequately safe-guarded." 43 U.S.C. § 315b. Respondents also offer no reply to our showing that the amended "grazing preference" rule was *rejected* by Congress—indeed, by the most ardent supporter of the Secretary's "rangeland reform" agenda—as recently as 1993, and thus that the Secretary is attempting to accomplish by regulation what Congress has explicitly refused to do. As the district court and the dissent below recognized—with the court of appeals dividing 5-5 on rehearing the case *en banc*—this effort to evade the statute's requirements is impermissible.

Respondents' opposition to certiorari boils down to the claim that the 1995 changes to the grazing preference merely "clarified terminology." That argument is untenable. The new regulations make substantive changes that are inconsistent with the Secretary's statutory obligations.

1*a*. Respondents claim (at 14, 17) that the 1995 regulations constitute a "change in terminology" that "shift[s] components of the prior grazing preference rule into the 'permitted use' rule." They assert that the new rules "simply move the reference to [animal unit months] from the definition of the term 'grazing preference' in the prior rules to the new regulatory term 'permitted use.'" Thus, the argument goes, the 1995 rules "preserve all elements of [the former] preference" and "have no effect on the predictability of grazing on the public rangelands." Opp. 13, 15, 16.

True, the new term "permitted use" and the former term "grazing preference" both denote the amount of forage, expressed in AUMs, that may be grazed annually on a given base property. But that is where the similarity ends. Under the permitted use rule, "the maximum amount of forage that a permittee can graze is established solely by a land use plan adopted by the BLM." Pet. App. 62a. "The result," as Judge Tacha observed, "is that the agency has nearly unfettered discretion to * * * increase or decrease permittees' maximum allowed forage use without reference to the individual grazing decisions laboriously adjudicated by the Secretary following passage of the TGA." *Ibid*. Although land use plans are reviewed periodically to reflect new data and the like, the process of establishing such plans is highly discretionary, and the long-recognized grazing privilege plays no role in land use plan decisions. Thus, the new rules permit the Secretary to promote the favored land use *du jour* at the expense of his statutory obligation to "adequately safeguard" "recognized and acknowledged" grazing privileges.

This is in stark contrast to the regime that obtained for six decades and to the tens of thousands of individual grazing decisions issues by respondents documenting specific adjudications. To be sure, "[p]ermittees knew and understood that there would be year-to-year fluctuations in available forage and changes in the overall conditions of the range," but adjudicated grazing preferences "provided [permittees] with the certainty that if forage were abundant, grazing up to their preference limit would be authorized." Pet. App. 54a. Because this baseline provided year-to-year stability and allowed ranchers "to gauge how large or small their livestock operations could be" (*ibid.*), it also enabled lenders to determine their net worth in extending them credit. Indeed, as lenders attest, a preference that is merely a "priority" or a purely discretionary allotment unmoored from objective criteria such as available forage is illusory. See *Amicus* Br. of Farm Credit Institutions 6-12; *Amicus* Br. of Alameda Book Cliff's Ranch *et al*. 8-12; *Amicus* Br. of State Bank of Southern Utah 4-13; Pet. 25-27 (collecting authorities).

b. Respondents' claim that the 1995 changes are cosmetic also cannot be squared with the plain meaning of § 3 of the TGA, which states (43 U.S.C. § 315b (emphasis added)):

> *Preference shall be given in the issuance of grazing permits* to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, *as may be necessary to permit the proper use of lands*, water or water rights owned, occupied, or leased by them.

Respondents take the untenable position that "the term 'grazing preference' in the amended rules is a construction of the phrase '[p]reference shall be given in the issuance of grazing permits' in Section 3, while the term 'permitted use' in the amended rules is a construction of the phrase 'as may

be necessary to permit the proper use of lands.'" Opp. 10 n.7. But that reading improperly tears apart a statutory provision that must be read "as a whole." *ACF Indus.*, 510 U.S. at 343. Interpreting the term "preference" "in light of the terms that surround it" (*Smith* v. *United States*, 508 U.S. 223, 229 (1993))—"Preference shall be given in the issuance of grazing permits * * * as may be necessary to permit the proper use of lands"—there can be no doubt that adjudication of a "preference" includes a *substantive* determination about the appropriate use of public lands and does not merely denote "a superior or priority position against others." 43 C.F.R. § 4100.0-5 (1995). See also 43 U.S.C. § 315m.

c. The Secretary's opposition also ignores the TGA's unambiguous mandate that "consistent with the purposes and provisions of [the Act], grazing privileges recognized and acknowledged shall be adequately safeguarded." 43 U.S.C. § 315b. As we have explained (Pet. 3-5, 14-15), the adjudications conducted in the wake of the Act's adoption have long been understood as the means by which such privileges are "recognized and acknowledged."

Numerous courts have confirmed this in holding that the Act imposes an "affirmative obligation to adequately safeguard [grazing privileges]." *McNeil* v. *Seaton*, 281 F.2d 931, 934 (D.C. Cir. 1960);[1] see, *e.g.*, *Oman*, 179 F.2d at 742 ("by the very terms of the [TGA], the [United States] ha[s] not merely a duty to refrain from the invasion of plaintiffs'

[1] Respondents (at 11 & n.9) miscite *McNeil* for the proposition that "preference" means "that certain applicants for grazing permits * * * are favored over others." In fact, *McNeil* holds that "those qualifying under the [TGA] definitely acquired 'rights,'" which "are something of real value * * * which have their source in an enactment of the Congress." 281 F.2d at 934; accord *id.* at 938 (Burton, J., concurring in part and dissenting in part).

grazing privileges, but an affirmative obligation to adequately safeguard them"); *Red Canyon Sheep Co.* v. *Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938) ("the Act is intended, in the interest of the stock growers themselves, to define their grazing rights and to protect those rights by regulation against interference").

Respondents provide no alternative explanation of the term "recognized and acknowledged" grazing privileges. Congress's explicit mandate that the Secretary protect adjudicated grazing preferences is wholly inconsistent with respondents' view that protecting grazing privileges is but one of many policy options to be weighed in the Secretary's exercise of his "broad discretion." Opp. 3, 4.

d. Respondents view petitioners' grazing privileges as discretionary and revocable pursuant to land use plans, "without reference either to their individual circumstances or to the condition of the land covered by their permits." Pet. App. 62a. Consequently, they are forced to read the phrase "adequately safeguard" as requiring nothing more than "procedural safeguards" such as notice and an opportunity to "challeng[e] administratively" the loss of adjudicated grazing preferences. Opp. 16 n.12. But notice and hearing is already required by other provisions of the statute, *e.g.*, 43 U.S.C. § 315h, as well as by due process. Thus, respondents' view renders the Secretary's statutory duty to "adequately safeguard" grazing privileges entirely superfluous.

e. Lacking any meritorious response, respondents attack a straw man—saying our position is that the TGA grants "fixed grazing rights" that "guarante[e] a permittee the right to graze [a certain] amount of forage every year." Opp. 13.

We have repeatedly acknowledged, however, that the TGA does not "create any right, title, interest, or estate in or to the lands." 43 U.S.C. 315b; see Pet 4. A permittee may not

obtain title to grazing lands, and the Secretary may lawfully adjust a permittee's active use on the basis of factors such as range condition, the range's ability to support livestock, the need for range improvements, or the conduct of the permittee. 43 C.F.R. §§ 4110.3-2(a), (b) (1994). But while the TGA does not *create* any rights in or to the *lands*, it explicitly does *safeguard* recognized and acknowledged grazing privileges. Indeed, once established, the grazing privilege "is to be regarded as an indefinitely continuing right." *Shufflebarger* v. *Commissioner*, 24 T.C. 980, 992 (1955). It is one thing to say that the Secretary may adjust a permittee's grazable forage based on objective criteria. It is another to say that he may altogether dispense with such criteria and allocate grazing rights on the basis of subjective land use plans that in no way safeguard adjudicated grazing privileges.

f. The Secretary's permitted use rule, therefore, is plainly a change in substance rather than terminology. Inasmuch as "[t]he Department's current interpretatio[n] [is] in conflict with its initial position" of some 60 years in duration, it "is entitled to considerably less deference." *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981); accord *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

g. Respondents claim (at 17), without explanation or basis, that "using land use plans in determining grazing preferences will likely result in greater, not lesser, stability for grazing permittees." This unsupported assertion is frankly absurd. Until 1995, land use plans incorporated adjudicated grazing privileges and any reduction in livestock numbers had to be justified based on monitoring data and phased in over five years. 42 C.F.R. § 4110.3. Absent the limits set forth in the pre-1995 regulations, the Secretary is free to ignore adjudicated grazing privileges. He can now reduce livestock grazing numbers to, say, provide more forage for native elk, or

even eliminate grazing altogether—regardless of the impact on the 28,000 individual permittees and lessees.

Respondents' contention is flatly contradicted by the *actual experience* of permittees and agricultural lenders under the new regulations. The permitted use rule has thrown into doubt the most basic principles of lending to ranchers. As *Amicus* Alameda Book Cliff's Ranch explains (at 11), "a majority of lenders in both the Pacific Northwest and the Southwest will no longer consider BLM grazing privileges in evaluating security for loans," and grazing privileges "will also no longer be considered in appraisals of ranch value either for purposes of sale or use of the ranch as collateral for a loan." Because "[m]ost BLM ranchers operate on a one to two percent profit margin and are highly vulnerable to small fluctuations in cost or income," many "will be forced out of business." *Id.* at 11-12. The risk of rancher default also poses a "serious threat of failure" to lenders (*id.* at 12), including the multi-billion dollar Farm Credit System, whose lenders depend heavily on loans to livestock producers. See *Amicus* Br. of Farm Credit Institutions 6-12; *Amicus* Br. of State Bank of So. Utah 5-13. It would come as some surprise in these hard-hit quarters to learn that the new permitted use rule will result in "greater, not lesser stability for grazing permittees." Opp. 17.

The legislative history confirms that these eventualities were precisely the concerns in the forefront of Congress's mind when it enacted the TGA. See *Amicus* Br. of Alameda Book Cliff's Ranch 5-10; Pet. 17-18. Indeed, Senator Harry Reid—who sponsored a statutory amendment adopting most of the 1995 regulations as law—explained that "eliminating this preference would devaluate the permit in the eyes of lending institutions. I knocked that out." 139 Cong. Rec. S14083, 14087 (1993). The permitted use rule is thus a flagrant attempt to circumvent the will of Congress.

In the end, the Secretary's interpretation is a rhetorical attempt to obfuscate the fact that the TGA, read as a whole and confirmed by its legislative purpose and history, imposes a substantive obligation to "adequately safeguard" "recognized and acknowledged" grazing privileges. That attempt is illegitimate. But even if there is room for debate, that does not diminish the importance of the question presented: the meaning of the grazing preference recognized by the TGA is an issue that should be finally resolved by this Court—not by a bare majority of a panel of the court of appeals, where the district court, the dissent, and the 5 judges who voted to grant rehearing have indicated their disagreement.[2]

2. Section 315c requires that when a new permit is issued, compensation be paid for "improvements constructed and owned by a prior occupant." The range improvements rule, we argued in the petition, renders that command superfluous by forbidding ownership of permanent range improvements.

Respondents answer (at 20) that, while the new regulations do strip permittees of the right to own permanent improvements, they still allow permittees to hold title to *removable* range improvements, such as creep feeders or loading chutes. But those are not improvements "constructed" on the land, nor are they items to which the government could constitutionally assert title, any more than it could assert title to the pickup truck that a rancher drives on public lands. When Congress wrote Section 315c, it clearly had in mind the types

[2] Respondents make much of the "lengthy rulemaking" that preceded adoption of the 1995 rules. Opp. i; see *id.* at 7. But compliance with rulemaking procedures does not render a rule immune from challenge. If anything, the large number of critical comments submitted concerning the 1995 rules demonstrates the tremendous practical importance of the changes and belies respondents' claim that they were limited to "terminology."

of improvements affected by the new regulation: fences, wells, pipelines, and the like—*improvements that the prior occupant cannot take with him, and for which he therefore is to be compensated*. The statute does not, after all, speak of "improvements constructed, owned, and left behind" by the prior occupant, but straightforwardly provides:

> No permit shall be issued which shall entitle the permittee to the use of such *improvements constructed and owned by a prior occupant* until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior.

The range improvements rule runs counter to this statutory language and is beyond the Secretary's authority to enact.

3. Respondents' answer to our contention that the mandatory qualifications rule violates the TGA is that our "insistence that permittees must * * * be engaged in the livestock business" erroneously "reads out of the statute the independent clauses in the preference provision giving preference to 'bona fide occupants or settlers' or 'owners of water or water rights' *in addition to* "landowners engaged in the livestock business." Opp. 23. Under our view, they maintain, (i) bona fide occupants or settlers, and (ii) owners of water rights could never "be qualified to receive permits." *Ibid.*

Respondents grossly mischaracterize our argument. Section 315b first authorizes the Secretary to issue "permits *to graze livestock*." It then identifies certain categories of applicants—"those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights"—who are entitled to "[p]reference" in the issuance of such permits.

Accordingly, we do not deny that "bona fide occupants or settlers" or "owners of water or water rights" can obtain permits. Nor do we contend that § 315b requires that permit holders be engaged exclusively—or even *primarily*—in the livestock business. See *Forgey Ranch* v. *BLM*, 116 IBLA 32 (1990) (permitting bank engaged in livestock business to retain grazing permit). But insofar as § 315b *also* states (i) that the Secretary must issue "permits *to graze livestock*," (ii) "to such bona fide settlers, residents, and *other stock owners* as under his rules and regulations are entitled to participate *in the use of the range*," it is unreasonable for the Secretary to allow those who conduct no livestock business whatsoever to obtain "permits to let the land sit idle."

Indeed, by ignoring the clauses quoted above and focusing solely on the phrase that lists preferred permit applicants, it is *respondents*' interpretation that "improperly reads out of the statute" important qualifying language. Opp. 23; see *ACF Indus.*, 510 U.S. at 343 (statutory language must be read "as a whole," not "in isolation"). As we have explained (Pet. 23-24), this reading leads to other difficulties as well. Respondents have not answered those points.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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